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No. 83-1085

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

MELAMINE CHEMICALS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

The antitrust consent decree at issue here requires petitioner, the nation's largest producer and user of melamine, to purchase significant volumes of melamine from other producers but permits petitioner to obtain relief from this requirement by showing that such relief "will not be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." The decree provides no alternate standard for modification or termination.

The question presented is:

> Whether the court of appeals properly applied the express textual standard for termination contained in the decree or whether a lower "public interest" standard applies instead.

PARTIES TO THE PROCEEDING

The petitioner is American Cyanamid Company ("Cyanamid"), the defendant in the underlying civil antitrust case, *United States v. American Cyanamid Co.*, No. 60 Civ. 3857 (S.D.N.Y. filed Oct. 5, 1960). Respondent Melamine Chemicals, Inc. ("MCI") is jointly owned by Ashland Oil, Inc.* and First Mississippi Cor-

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* Pursuant to this Court's Rule 28.1, the following are non-wholly-owned subsidiaries or affiliates of Ashland Oil, Inc.:

Allemania Chemical Company
Applied Chemicals Products (Pty) Ltd.
Applied Foundry Products (Pty) Ltd.
Applied Industrial Products (Pty) Ltd.
Arch Mineral Corporation
Ashland Coal, Inc.
Ashland Croda Pty. Ltd.
Ashland-Avebene
Ashland-Suedchemie-Giesserei Chemikaline
Ashland-Suedchemie-Kernfest GmbH
B. V. Ashland-Suedchemie v/h Necof

[Continued]

poration.** MCI was not a party to the original action but was permitted to intervene in the 1982 proceedings on Cyanamid's motion to terminate the 1964 judgment which concluded the 1960 antitrust action against Cyanamid. The United States of America ("Government") was the plaintiff in that action and has been made a respondent here pursuant to Rule 19.6 of this Court.

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* [Continued]

Cumberland Materials, Inc.
Establissement Locab
500 Cary Corporation
Iberia Ashland Chemical S.A.
Mikro Pul GmbH
Mikro Pul-Duclone S.A.R.L.
Resource Sciences-Arabia Ltd.
Super Mom's Kitchens, Inc.
Travelers Inns of Charlotte, Inc.
Travelers Inns of Winston-Salem, Inc.
Travelers Inns of Wytheville, Inc.
U.S. Felt Company
WICMAP Transport Pty. Ltd.

** Pursuant to this Court's Rule 28.1, the following are non-wholly-owned subsidiaries or affiliates of First Mississippi Corporation:

Ammonia Producers
International Genetic Sciences Partnership
Triad Chemical

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A1-A22) is reported at 719 F.2d 558. The opinion of the District Court terminating the consent decree (Pet. App. A25-A46) is reported at 556 F. Supp. 361. The consent decree (Pet. App. A68-A86) was entered in August 1964 and is published at 1964 Trade Cas. (CCH) ¶ 71,166.

COUNTERSTATEMENT OF THE CASE

The Initial Complaint

The 1960 complaint (Pet. App. A87-A99) in this civil antitrust action charged Cyanamid with violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1982) and Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982). The complaint alleged that Cyanamid and

others had conspired to restrain and monopolize trade in melamine[1] and that Cyanamid had illegally acquired the Formica Company, a "leading consumer" of melamine, "for the purpose of foreclosing others from opportunities to make sales of melamine or melamine containing products to such company" (Pet. App. A95). The complaint charged that Cyanamid's acquisition of Formica substantially lessened competition and tended to create a monopoly in violation of Section 7 of the Clayton Act (*id.*).

As a result of these violations, the complaint alleged that the prices of melamine and melamine-containing products were maintained at unreasonably high levels, that competition in the manufacture of melamine and melamine-containing products was lessened, that actual and potential competition in melamine was foreclosed, and that the public was deprived of an adequate supply of melamine and melamine-containing products (Pet. App. A96).

The Final Judgment

In August 1964, the Government's antitrust action against Cyanamid was settled by the entry of a final judgment (Pet. App. A68-A86). Although Cyanamid was not required to divest Formica, Part XI of the consent decree—the only provision of the decree now in issue—requires Cyanamid to purchase annually from other producers an amount of melamine equal to its domestic melamine requirements for the production of laminates, *i.e.*, the quantity of melamine required by its recently acquired Formica subsidiary (Pet. App. A81-A82). In making such purchases, Cyanamid is to give preference to United States melamine producers. The purpose of Part XI, as later articulated by the Government, is "to deny to Formica the benefits which might accrue from vertical integration with Cyanamid and to require Formica to compete worldwide for melamine with other

[1] Melamine is a substance used in the manufacture of high-pressure laminates and other plastic products.

producers of laminates."[2] In contrast to the decree's restrictions on Cyanamid's production of melamine, *see* Part V (Pet. App. A73-A74), which are expressly limited to a term of 10 years, the purchase requirement of Part XI operates in perpetuity unless Cyanamid meets the test for modification specifically set forth in Part XI.

Part XI permits Cyanamid to petition the Court for relief from its requirement any time after 10 years from the date of the decree.[3] The requested relief is to be granted only "upon a showing by Cyanamid to the satisfaction of [the] Court that the effect of such relief will not be substantially to lessen competition or tend to create a monopoly in any line of commerce or any section of the country" (*id.* at A81). This standard tracks the language of Section 7 of the Clayton Act—the provision of the antitrust laws which governs mergers and acquisitions and the statutory provision that the Government charged Cyanamid with violating when it acquired Formica. Part XI provides no alternate standard for termination when the Government consents to the relief requested. In stark contrast, other provisions of the decree which contain modification standards modelled on the language of Section 7 of the Clayton Act specifically provide, as an alternative, that the requirements of the decree may be modified if the Government consents to the relief requested (*see* Parts XIII (B), (C) and (D) (Pet. App. A83-A84)).

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[2] Memorandum of the United States in Opposition to the Application by American Cyanamid Company for a Protective Order Pursuant to Section XI(c) of the Final Judgment, November 14, 1974 at 3 (C.A. App. 73).

[3] The decree also allows Cyanamid to apply for relief at any time if it "considers that the melamine price offered for its [required] purchase" under Part XI is "oppressively high." The decree provides that relief from high prices will be granted if Cyanamid could show "to the satisfaction of [the] Court that the price is noncompetitive" (Pet. App. A82). In seeking to terminate the decree, Cyanamid has not claimed that the price which it pays for melamine purchased pursuant to Part XI is noncompetitive.

Proceedings on Cyanamid's Motion to Terminate the Consent Decree

On August 6, 1982, Cyanamid, with the consent of the Government, moved to terminate those provisions of the 1964 decree that were still in effect. Pursuant to notice requesting comments, MCI, a producer of melamine, Dart Industries, a plastic laminates producer, and Plastics Manufacturing, Inc., a producer of melamine resins for plastic laminates, all filed comments opposing the proposed termination.[4]

MCI's principal objection to termination of the decree was that elimination of the outside purchase requirement of Part XI would permit Cyanamid, the nation's largest producer of melamine, to consummate its acquisition of Formica, the nation's largest user of melamine, thereby foreclosing competitors of Cyanamid from the opportunity to sell melamine to Formica. As a result, competition in the production and sale of melamine and melamine-containing products would be substantially lessened. In support of its contention, MCI demonstrated that the markets for melamine and melamine-containing products are highly concentrated, that the degree of vertical integration between those markets is high, that there are substantial barriers to entry in the production of melamine, that Cyanamid (and its Formica subsidiary) has substantial market power at each market level and that, as a result of the inevitable vertical

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[4] The District Court granted motions to intervene filed by MCI and Dart (Pet. App. A47-A54). The Court found that MCI had relied upon the provisions of the consent decree in entering the melamine industry, that there was a "close relationship" between MCI's claims and the main issue before the Court, and that permissive intervention "will not unduly delay or prejudice the original parties" to the litigation (*id.* at A53-A54). In "light of the unusual factual setting," the Court found that MCI should be permitted to intervene (*id.* at A54).

integration between Cyanamid and Formica, substantial foreclosure of competition is likely.[5]

The Decision of the District Court

On January 10, 1983, in a Memorandum Decision, the District Court ruled that termination of the decree was "in the public interest" (Pet. App. A34, A41). With respect to the termination of Part XI, the District Court declined to apply the "higher standard of proof" for modification specifically set forth in that provision, *i.e.*, that Cyanamid show that termination would not substantially lessen competition or tend to create a monopoly (*id.* at A34). Despite the fact that the express textual standard contained in Part XI was unqualified and, by its terms, applied whenever *any* modification was requested, the District Court ruled that it did not apply when the Government consented to the relief sought (*id.*).

The Memorandum Decision did not clearly state the basis of the District Court's conclusion that termination of the decree was "in the public interest." However, it appeared that the Court relied on certain alleged changes in the melamine industry since entry of the consent decree in 1964 (Pet. App. A31-A32, A41) and on "[c]ontemporary economic theory" which, in the District Court's view, "recognizes that vertical integration may foster corporate efficiency and *enhance* competition in the market place" (*id.* at A37) (emphasis in original). In discussing the probable consequences of vertical integration of Cyanamid and Formica, the District Court relied upon its understanding of what a hypothetical "rational" manager of Cyanamid's melamine operations or Formica's

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[5] Neither Cynamid nor the Government disputed MCI's contention that the extent of vertical integration arising from the consummation of Cyanamid's acquisition of Formica was substantially greater than that present in any judicially approved acquisition.

purchasing division should do (Pet. App. A37-A38, A40 n.7).[6]

The Decision of the Court of Appeals

Finding that the District Court had failed to apply the proper standard for termination of Part XI of the decree, the United States Court of Appeals for the Second Circuit reversed the decision to terminate and remanded the case to the District Court for further findings.[7] The Court of Appeals found that the explicit language of Part VI "unambiguously" provides that, in order to modify or terminate this provision, Cyanamid must show that the relief requested "will not be substantially to lessen competition or tend to create a monopoly" (Pet. App. A14). Because "[n]o provision has been made to apply a different standard where the Government joins in a motion to terminate" Part XI of the decree (*id.* at A15), the Court of Appeals held that the District Court erred in failing to apply the standard for modification set forth in the text of the decree.

Looking beyond the "four corners" of Part XI to the context of the overall decree and the underlying regulatory statute, the Court of Appeals also found that termination of Part XI under the "public interest" test urged by Cyanamid required reference to the standard set forth in Section 7 of the Clayton Act and incorporated in the

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[6] The District Court also found "that an abrupt termination [of the purchase requirement of Part XI] will have an adverse impact on MCI of a serious nature" (Pet. App. A41), and that, as a Court of Equity, it should provide some "period of time for a gradual phasing out of the purchase requirement" (*id.* at A41, A44). However, solely "in light of the inability of the parties to agree on a gradual phased in termination" of purchases and the "judicial impossibility" of determining a reasonable period of time for such a gradual phase-out, the Court ordered that the decree be terminated immediately, effective January 1, 1983 (*id.* at A44, A45).

[7] The Court of Appeals affirmed the decision permitting MCI to intervene. The propriety of this aspect of the Court of Appeals' decision is not presented as a question for this Court (Pet. i).

text of Part XI itself, *i.e.*, whether termination would substantially lessen competition or tend to create a monopoly (*see id.* at A15-A17).

The Court of Appeals then found that, although the District Court purported to "implicitly" consider whether termination would substantially lessen competition or tend to create a monopoly (Pet. App. A17-A18), the District Court had failed to apply the "standard framework" for analyzing the legality of mergers under this standard (*id.* at A19). Rather than apply "the current state of the law as prescribed by the Supreme Court, which circuit and district courts are bound to follow" (*id.* at A20), the District Court improperly relied upon "contemporary economic theory." Accordingly, the Court of Appeals remanded the case to the District Court for further proceedings consistent with its opinion.

REASONS FOR DENYING CERTIORARI

The petition should be denied because the holding of the Court of Appeals was correct and because it does not present an important question for resolution by this Court. The decision sought to be reviewed turned upon the Court of Appeals' interpretation of the meaning and effect of specific language in an unusual provision of a single antitrust consent decree and upon the nature of the specific findings of the District Court. Accordingly, as the Government itself states in opposing the petition, the Court of Appeals' decision does not have wide-ranging precedential value. Moreover, in concluding that the District Court erred in terminating Part XI of the consent decree, the Court of Appeals simply followed well-established precedent. Its decision does not in any way conflict with the holdings of this Court or any other court of appeals. Finally, because the Court of Appeals remanded the case to the District Court for further proceedings, this matter is in an interlocutory posture that does not justify Supreme Court review.

I. THE DECISION BELOW AFFECTS ONLY THE PARTICULAR CONSENT DECREE INVOLVED IN THIS CASE

The Court of Appeals' decision was based on the meaning and effect of the termination clause contained in Part XI of the consent decree in the Government's 1960 antitrust action against Cyanamid. Because termination provisions of the sort contained in the Cyanamid consent decree are extremely rare, the Court of Appeals' decision presents no question of general public importance for this Court's review.

In an effort to secure Supreme Court review, petitioner ignores the narrow basis of the Court of Appeals' decision and suggests that the decision establishes a broad, new standard for termination and modification of all consent decrees.[8] Clearly, however, the Court of Appeals' decision was explicitly based on the proper interpretation and application of the specific termination standard contained in the Cyanamid decree. The Court of Appeals itself recognized the narrow basis of its ruling when it stated the question before it: "whether the District Court erred in applying a 'public interest' standard to decide whether to terminate Part XI of the

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[8] Petitioner also raises several constitutional questions, *i.e.*, that there can be no judicial review of the parties' agreement to terminate the consent decree because (1) there is no case or controversy (Pet. 14-16) and (2) judicial review intrudes on the authority of the Executive Branch to conduct its own litigation (Pet. 18-19). Because these issues were not raised below, this Court should not consider them now. Moreover, these arguments are patently frivolous and, if accepted, would preclude *all* judicial review of *any* aspect of consent decree proceedings, contrary to established case law and the intent of Congress which enacted the Antitrust Penalties and Procedure Act, 15 U.S.C. § 16(b-h) (1982) to correct the practice of judicial rubber stamping of consent decrees. *See* H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). Significantly, the Government does not share petitioner's belief that the decision below presents a serious constitutional issue as to the Government's ability to conduct its own litigation (Gov. Br. 8 n.7).

decree which provided its own higher standard . . . ."[9] (Pet. App. A3).

The Court of Appeals' narrow textual ruling presents no question of general public importance. Consent decrees rarely contain special standards for modification or termination of the type at issue here.[10] The Antitrust Division has conducted a partial review of the over 1300 antitrust consent decrees currently in effect and discovered fewer than six decrees that contain termination standards "similar to the one in this case" (Gov. Br. 9).[11] Accordingly, the particular circumstances giving rise to the Court of Appeals' narrow, textually-based ruling are unlikely to be repeated and the Court's ruling is therefore unlikely to have significant precedential value. Thus, the Government, which is responsible for administering consent decrees, concludes that "the court of appeals' narrowly-based decision should not have a significant effect upon the government's authority to secure termination of antitrust decrees . . . ." (Gov. Br. 9). Cases de-

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[9] In opposing the petition, the Government recognizes that the "rationale" of the Court of Appeals' decision is "inseparable from the special standard contained in the . . . decree" and that the decision is therefore "limited to the unusual facts of this case" (Gov. Br. 9).

[10] Indeed, the exact standard contained in Part XI—which tracks the language of Section 7 of the Clayton Act—is, to MCI's knowledge, unique among antitrust consent decrees. Clearly, a termination provision that tracks Section 7 of the Clayton Act would never be found in decrees in such disparate areas of the law as taxation, securities regulation, civil rights and land and natural resources management, in which Cyanamid predicts the Court of Appeals' decision will have dire consequences.

[11] As Cyanamid itself acknowledges, the current "standard practice" in government antitrust consent decrees is now to provide that a decree terminate automatically after a period of years. Memorandum of Defendant American Cyanamid Company in Support of Its Motion For Termination of the Consent Judgment, August 6, 1982 at 11. As a result, it is unlikely that future decrees will contain special termination standards similar to that at issue here.

cided after the Court of Appeals' decision belie petitioner's claim that the Court's holding will have serious adverse consequences for the administration of antitrust consent decrees. As pointed out by the Government, none of the four government antitrust decrees that have been terminated by consent since the Court of Appeals' "narrowly-based decision" was affected by the Second Circuit's decision (Gov. Br. 9 n.9).

II. THE COURT OF APPEALS' DECISION WAS CORRECT AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS

A. The Court of Appeals Properly Interpreted the Requirement of Part XI

The express language of Part XI of the decree provides that termination requires a showing that it "will not . . . substantially . . . lessen competition or tend to create a monopoly in any line of commerce in any section of the country" (Pet. App. A81). On its face, this standard is unqualified and applies whenever termination of Part XI is sought. There is no exception or lower standard for termination sought with the Government's consent.

The Court of Appeals' construction of the meaning and effect of this provision was a straightforward application of the standards previously enunciated by this Court. Applying the rule that "the scope of a consent decree must be discerned within its four corners . . . and the instrument must be construed as it is written," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971), the Court of Appeals construed the text of this decree "as it is written." In doing so, the Court of Appeals properly found that Part XI "unambiguously" provides its own standard for termination or modification (Pet. App. A14). Because "[n]o provision has been made to apply a different standard where the govern-

ment joins with Cyanamid in a petition to terminate," the Court declined to apply a lower "public interest" standard urged by petitioner (*see id.* at A15). Significantly, despite its claim that the Court of Appeals' holding was clear error and contrary to the entire fabric of consent decree jurisprudence, petitioner cites no case in this or any other court which holds that it is improper for a court to apply the express and unqualified termination provision of a judicially sanctioned consent decree merely because the Government and the defendant subsequently believe a different standard should apply.

Petitioner argues that Part XI does not mean what it plainly says and that the parties intended the termination provision of Part XI to apply only when the Government does not consent to the proposed termination (Pet. 7 n.9).[12] However, this construction of the decree is contradicted by the unqualified language of Part XI and by the fact that other provisions in the same decree contain identical modification standards which explicitly provide an alternate standard for modification when the Government consents (*see* Parts XIII(B), (C), and (D) (Pet. App. A83-A84)). If the parties had intended the meaning urged by petitioner, "one can hardly think of less appropriate language . . . ." *United States v. Atlantic Refining Co.*, 360 U.S. 19, 22 (1959).

Petitioner also suggests that the Court of Appeals erred in applying the express textual standard in Part XI because, under principles of contract law, parties who have agreed to a consent decree ought to be free to modify its provisions at will. According to this argument, Part XI of the decree should have been terminated be-

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[12] Curiously, although it elsewhere castigates the Court of Appeals for going beyond the express language of the decree to analyze its purpose, petitioner's underlying claim that the termination provision of Part XI does not apply when the Government consents depends on its own *post hoc* interpretation of the purpose of the decree and the intent of the parties.

cause both petitioner and the Government agreed that termination was in the "public interest," even though they both effectively conceded that the express textual standard for modification had not been met.

However, as the Court of Appeals recognized, consent decrees are judicial acts, not simple contracts (Pet. App. A12). *See also United States v. Swift & Co.*, 286 U.S. 106, 115 (1932); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975); *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201 (N.D. Ill. 1975). Accordingly, a court is not required to modify or enter a decree simply because the parties ask it to. It was precisely to avoid such judicial "rubber stamping" that Congress enacted the Antitrust Penalties and Procedures Act. *See supra* note 8. Thus, the Court of Appeals was not required to apply a lower standard for termination than the one contained in Part XI simply because petitioner and the Government urged it to do so.

B. The Court of Appeals Properly Found That the District Court Erred in Terminating the Decree Under a "Public Interest" Standard

In reversing the District Court's decision terminating Part XI of the decree, the Court of Appeals also considered whether, in the specific context of the overall decree and the underlying statute, the District Court properly concluded that termination was in the "public interest." The Court of Appeals correctly noted that public interest "should be based on more than a broad and undefined criterion such as promotion of the public welfare" (Pet. App. A16). *Accord NAACP v. FPC*, 425 U.S. 662, 669 (1976); *United States v. Motor Vehicle Manufacturers Association of the United States*, 643 F.2d 644, 651 (9th Cir. 1981). As the Government urged below and recognizes here (Gov. Br. 6), the Court of Appeals found that the meaning of "public interest" derives "from the

purposes of the regulatory legislation," *NAACP v. FPC*, 425 U.S. at 699—[13] here, the Sherman and Clayton Acts.

In particular, the Court of Appeals correctly concluded that the statutory provision which underlies Part XI of the consent decree is Section 7 of the Clayton Act—the provision of the antitrust laws which deals with mergers and acquisitions. The petition does not—and cannot—dispute this conclusion. The purchase requirement of Part XI was designed to deny petitioner the anticompetitive benefits of its challenged acquisition of Formica without requiring the typical relief of divestiture. As the Government stated during earlier proceedings to modify Part XI, the purchase requirement of that provision "was designed . . . to deny to Formica the benefits which might accrue from vertical integration with Cyanamid" (C.A. App. 73). Under these circumstances, the Court of Appeals properly held that termination of Part XI was governed by reference to the standards for assessing the legality of acquisitions set forth in Section 7 of the Clayton Act, and specifically incorporated in the text of the decree, *i.e.*, whether termination would substantially lessen competition or tend to create a monopoly.[14]

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[13] The District Court's authority to enter a consent decree in the first place "comes only from the statute which the [consent] decree is intended to enforce." *System Federation No. 91, Railway Employees' Department v. Wright*, 364 U.S. 642, 651 (1961). Thus, "the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives." *Id. See also United States v. Motor Vehicle Mfrs.' Ass'n of the U.S.*, 643 F.2d 644, 651 (9th Cir. 1981) ("parties may not enter into a consent judgment inconsistent with the statutory framework under which the action was brought").

[14] Petitioner contends that the Court of Appeals erred in looking at the "purpose" of Part XI. However, the entire basis of petitioner's argument that the decree should be terminated is that conditions in the melamine market have allegedly changed so dramatically since the entry of the Decree, that it no longer serves the "purpose" for which it was intended. Moreover, where there is a dispute concerning the construction of a decree, it is appropriate to consider

The Court of Appeals then found that although the District Court purported to determine whether termination of the consent decree would create a monopoly or lessen competition (Pet. App. A17-A18), the District Court failed to conduct the type of analysis necessary for an adequate factual determination of the competitive effect of terminating Part XI (*id.* at A19-A21). In place of applicable legal precedent concerning the competitive impact of a vertical acquisition, the District Court relied on "contemporary economic theory" that vertical integration "may enhance competition," citing a single economist who categorically asserted that "vertical mergers produce no anticompetitive effects" (*id.* at A37). Accordingly, the Court of Appeals correctly remanded the case for the District Court to apply the "standard framework of analysis" (*id.* at A19) for a vertical acquisition to determine whether the decree should be terminated.

III. CERTIORARI SHOULD BE DENIED BECAUSE OF THE INTERLOCUTORY NATURE OF THE JUDGMENT BELOW

Petitioner states that continuation of the decree is anticompetitive and implies that, unless review is granted, the decree will not be terminated. In fact, however, the Court of Appeals did not conclude that the decree should not be terminated. Rather, it remanded the case for further proceedings which would have to be undertaken whether or not this Court accepts the petition and reverses the Court of Appeals' decision with

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"the circumstances surrounding the formation of the consent order". *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238 (1975); *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) (where this Court looked at the "reasons" stated in the complaint); *United States v. Motor Vehicle Mfrs.' Ass'n of the U.S.*, 643 F.2d 644, 650 (9th Cir. 1981).

respect to the proper standard for termination of Part XI of the decree.[15]

Under the circumstances, denial of certiorari is appropriate in light of the longstanding principle that this Court "should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, Tampa & Key West Railway*, 148 U.S. 372, 384 (1893). This Court has consistently adhered to this practice in later decisions. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"). *See also* R. Stern & E. Gressman, *Supreme Court Practice* ¶ 4.19 at 300 (5th ed. 1978).

Denial of the petition will not preclude later review of this case. In *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916), for example, the Court rejected the argument that denial of certiorari from an interlocutory judgment precluded review of the questions decided by the interlocutory decision when the case was ultimately accepted after a second, final decision. The Court explained that "except in extraordinary cases, the writ is not issued until final decree" and the nonfinal nature of a decree is "a fact that of itself alone furnished sufficient ground for the denial of the application . . . ." *Id.* at 258. Petitioner has not presented

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[15] In a portion of the Court of Appeals' opinion which petitioner does not challenge, the Court of Appeals found that the District Court erred in concluding that, as a Court of Equity, it did not have the power to order a gradual phase-out of the purchase requirement of Part XI even though it found that immediate termination of that requirement would work a substantial and inequitable hardship upon MCI (Pet. App. A21). Thus, the District Court must conduct further proceedings on the method of termination even if its basic conclusion that the decree should be terminated is upheld.

any compelling or "extraordinary" reason for this Court to deviate from its usual practice of denying interlocutory review. The Court should refuse to accept review of the interlocutory judgment below.

CONCLUSION

For all the foregoing reasons, the petition should be denied.[16]

Respectfully submitted,

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[16] The Government's suggestion, made in a footnote (Gov. Br. 10 n.10), that summary reversal is appropriate should also be rejected.